(4) Nevertheless, certain courts have extended the doctrine one step further, and have held that a person not named in the injunction, and not included in a class designation, may be bound thereby, even if he is a stranger to the parties named.[14] An attempt is made to support this holding by saying that the punishment in contempt is for an act opposed to the power and dignity of the courts, rather than for an act violative of the rights of the person for whose protection the injunction was granted.[15] As Chief Justice Angellotti convincingly points out in the principal case, however, it is difficult to see wherein A, a stranger to X, opposes the power and dignity of the courts by doing an act which the court has merely forbidden X to do. California, in declining to punish A for contempt, follows the rule in New York[16] and certain other jurisdictions.[17]

Thus we see that an injunction will bind persons not named, whether enjoined as a class or not, provided they are closely associated with the parties named. On the other hand, the better reasoned cases hold that an injunction will not bind persons not named, whether enjoined as a class or not, unless they are so associated with the parties named. To decide whether an injunction binds a person whom it does not name, therefore, the question is not, "Is this person enjoined by a class designation?", but rather, "Is this person closely associated with the parties named?"

P. L. F.

PERPETUITIES: RESTRAINTS ON ALIENATION.—*In re Rawitzer*[1] once more directs the attention of the bar to certain questions in the California law concerning restraints on alienation. A testator left his entire estate, including certain real property in California, to a trustee upon a trust to hold for the benefit of his six children who were to enjoy the income; each of whom upon attaining the age of thirty was to obtain a proportionate part of the estate, the share of any child dying before attaining that age to fall into the amount to be divided among the survivors. It was held that in as much as failure to attain the age of thirty would operate as a condition subsequent divesting the right of any child, and in as much as a trust would result to the estate

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[14] Mears Slayton Lumber Co. v. District Council (1910), 156 Ill. App. 327; State v. Pittsburg (1909), 80 Kans. 710, 104 Pac. 847, 25 L. R. A. (N. S.) 226; Garrigan v. United States (1908), 163 Fed. 16, 23 L. R. A. (N. S.) 1295 (dictum); O'Brien v. People (1905), 216 Ill. 354, 75 N. E. 108; Chisolm v. Caines (1903), 121 Fed. 397; High, Injunction, § 1440, b.

[15] Garringan v. United States, supra, n. 13; In re Reese (1901), 107 Fed. 942. On this distinction, see Bessette v. Conkey Co. (1903), 194 U. S. 324, 48 L. Ed. 997, 24 Sup. Ct. Rep. 665.

[16] Strawberry Island Co. v. Cowles, supra, n. 9; In re Zimmerman (1909), 119 N. Y. Supp. 275; Rigas v. Livingston, supra, n. 9.

[17] Ex parte State (1909), 162 Ala. 181, 50 So. 143; Boyd v. State (1886), 19 Neb. 128, 26 N. W. 925.

[1] (June 28, 1917), 54 Cal. Dec. 41, 166 Pac. 581.

of the testator upon the death of all before any should attain thirty years,[2] there could be no violation of section 715 of the Civil Code.[3]

The case is chiefly interesting from the tacit assumption that the whole trust would have failed had there been an attempt to restrain alienation for thirty years at all events, following the rule of In re Walkerly.[4] In that case there was an attempt to create a trust of the Walkerly Block in Oakland, the trustee to pay the income to certain persons named or their heirs during the life of the testator's widow or in any event for twenty-five years, at the end of which time to sell and divide the proceeds among persons named or their heirs. There was clearly an attempt to restrain alienation for a period which might exceed the life of the widow, in violation of section 715 of the Civil Code. The court said that, assuming that all the interests were vested, still the very purpose and essence of the trust was that the land should not be alienated by the trustee during the trust term, wherefore any alienation before that time would be void under section 870 of the Civil Code,[5] as a contravention of the trust, and that therefore the restraint could not be disregarded as a repugnant condition.[6]

It is respectfully submitted that the court fell into an error in reaching this conclusion. The New York cases cited in support of the court's view[7] merely held that, under a New York statute which absolutely forbade the alienation of a beneficial

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[2] It seems abundantly clear that no reversionary interest or resulting trust should be held to be subject to the rule against perpetuities. Such seems to be the universal rule in the United States. Hopkins v. Grimshaw (1897), 165 U. S. 342, 41 L. Ed. 739, 17 Sup. Ct. Rep. 401; Universalist Society v. Boland (1892), 155 Mass. 171, 29 N. E. 524; Lougheed v. Baptist Church (1896), 40 N. Y. Supp. 586. But compare; In re Hollis Hospital (1899), 2 Ch. 540; In re Randall (1888), 38 Ch. Div. 213; and In re Bowen (1893), 2 Ch. 491.

[3] Note that at the last session of the legislature this section was amended to allow the absolute power of alienation to be suspended for a period not to exceed twenty-five years from the time of the creation of the suspension, as well as during the continuance of lives of persons in being at the creation of the limitation or condition.

[4] (1895), 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97.

[5] "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees in contravention of the trust is absolutely void."

[6] Crew v. Pratt (1897), 119 Cal. 139, 51 Pac. 38; Campbell v. Campbell (1907), 152 Cal. 201, 92 Pac. 184; Estate of Heberle (1908), 153 Cal. 275, 95 Pac. 41; Estate of Fay (1907), 5 Cal. App. 188, 89 Pac. 1065.

[7] The dictum in Hawley v. James (1836), 7 Paige Ch. 213, 16 Wend. 61 does support the court. But see Hone's Executors v. Van Schaick (1838), 20 Wend. 564; Douglas v. Cruger (1880), 80 N. Y. 15; and Oxley v. Lane (1866), 35 N. Y. 340, cited by the court.

interest in the rents and profits under a trust of land,[8] there could be no present alienation of the whole estate which would not be in violation of the trust and therefore void within a statute[9] similar to our section 870. On the other hand, another line of New York cases has held that such a restraint as that in question in the Walkerly case is not of the essence of the trust. Thus where a trust was created by express provision to continue for a specified period, it was held[10] that the beneficiaries of the income (their interest in that case being alienable) might assign their interest to the remainderman at once and he might forthwith assign the whole beneficial interest to a stranger who might require an immediate conveyance of the legal fee, and all without a hint that there might be any transfer void under section 730 of the Revised Statutes. It is therefore submitted that the restraint in the Walkerly case was not of the essence and should have been dropped without affecting the other terms of the trust.[11]

If this view of the matter be taken, it becomes necessary to consider whether the estates in the Walkerly case were contingent or vested in order to settle finally the rights of the parties. When we consider the sections of the Civil Code relative to the vesting of estates, we sympathize with the court in the Walkerly case in seeking a position by which a discussion of such questions[12] could be avoided. We cannot here discuss the question whether under the facts of that case the remainders were vested. Assuming, though not asserting, that they were not vested, still, at the death of the testator, there must have been persons in being entitled to the income, and it is hard to see why they should not be allowed to have it with a right of reversion in the estate as to all interests not validly disposed of. It is a well settled principle that where there is a partial failure of a trust the whole will not fail unless the part which fails is so intertwined with the whole that the trust could not fairly be said to be separable. While it has been held that, where there is an invalid provision to dispose of an indeterminate part of the *res* with an otherwise valid provision for the disposition of what

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[8] 1 R. S. 730, s. 63 (1830). Contrast section 867 of the Civil Code, whereby in absence of an express restraint, the interest of the beneficiary of an income trust of land is alienable.

[9] 1 R. S. 730, s. 65 (1830).

[10] Wells v. Squires (1908), 117 App. Div. 502, 102 N. Y. Supp. 592. See also In re Trumble (1910), 199 N. Y. 454, 464; 92 N. E. 1073. For an analysis of these cases as bearing upon the point in question, see an article by Professor Wesley N. Hohfeld in 1 California Law Review, 305.

[11] See also Harrison v. Harrison (1867), 36 N. Y. 543; Ernst v. Shinkle (1894), 95 Ky. 608, 26 S. W. 813; In re Corlie's Will (1895), 11 N. Y. Misc. 670, 33 N. Y. Supp. 572; Oxley v. Lane (1866), 35 N. Y. 340. Compare Eakle v. Ingrain (1904), 142 Cal. 15, 75 Pac. 566.

[12] Cal. Civ. Code, §§ 694, 716, 776.

is left, the whole trust fails,[13] the cases uniformly hold that an invalid disposition of remainders will not render unenforceable an otherwise valid provision for applying the income to certain persons for life.[14] It is therefore submitted that the result in the Walkerly case is in no case to be supported as to the interests of the persons entitled to the income in being at the testator's death, and is to be supported as to the other interests only in event they were not vested.

R. M. L.

PROCEDURE: EQUITY: BILL OF REVIEW FOR NEWLY DISCOVERED EVIDENCE.—The Code of Civil Procedure of California provides no other means of reviewing a judgment on the ground of newly discovered evidence than by filing and serving within ten days a notice of intention to move for a new trial.[1] Is this exhaustive, or has an equitable bill of review for newly discovered evidence a place in our judicial system? The Supreme Court has again been confronted with this question in the case of *San Francisco and Kings River Canal and Irrigation Company v. Stevinson,* and has again been relieved of the duty of answering it by the fact that the bill, even assuming that it is a recognized mode of procedure, would not lie in the particular case.[2] In this, as in former cases,[3] the court has expressed its willingness to recognize the remedy. But, for the first time, protest has been raised by individual judges,[4] on the ground that the statutory provisions governing new trials completely cover the subject.

The Superior Court is vested by the Constitution with jurisdiction in all cases in equity.[5] That this provision does not

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[13] Carpenter v. Cook (1901), 132 Cal. 621, 64 Pac. 997; Hofsas v. Cummings (1904), 141 Cal. 525, 75 Pac. 110.

[14] Nellis v. Rickard (1901), 133 Cal. 617, 66 Pac. 32; Sacramento Bank v. Montgomery (1905), 146 Cal. 745, 81 Pac. 138. Compare Estate of Willey (1900), 128 Cal. 1, 60 Pac. 471; Younger v. Moore (1909), 155 Cal. 767, 103 Pac. 221.

[1] Cal. Code Civ. Proc. §§ 657, 659.

[2] (June 29, 1917), 54 Cal. Dec. 58, 166 Pac. 338.

[3] In the following cases the bill of review was assumed to exist: Buckelew v. Chipman (1855), 5 Cal. 399; Mulford v. Cohn (1861), 18 Cal. 42; Butler v. Vassault (1870), 40 Cal. 74; Allen v. Currey (1871), 41 Cal. 318.

[4] Angellotti, C. J. and Henshaw, J.

[5] Cal. Const. Art. VI, § 5. It is clear that this provision does not crystallize equitable remedies as of the date of the Constitution. New rights may be created whereby new equities arise; existing rights may be abolished, and cases which courts of equity once entertained cease to arise, without thereby enlarging or curtailing the equitable jurisdiction of the court. Spreckles v. Hawaiian Sugar Co. (1897), 117 Cal. 377, 49 Pac. 353. Thus Cal. Civ. Code, § 3423 operates to prevent an injunction against the prosecution of an action, except where the object is to prevent a multiplicity of suits, a clear restriction on the jurisdiction of the High Court of Chancery. Spreckels v. Hawaiian Co. supra. Likewise Cal. Code Civ. Proc. §§ 525-533 have been held to constitute an exhaustive